

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1143

To be argued by
THOMAS F. MAXWELL, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1143

UNITED STATES OF AMERICA,

Appellee,

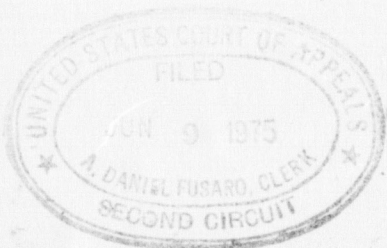
—v.—

JAMES V. CANESTRI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



PETER C. DORSEY
United States Attorney
District of Connecticut
915 Lafayette Blvd.
Bridgeport, Connecticut 06603

THOMAS F. MAXWELL, JR.
Assistant United States Attorney

5

TABLE OF CONTENTS

	PAGE
Statutes Involved	iv
Statement of the Case	1
Statement of Facts	2
Questions Presented	5
ARGUMENT:	
POINT I—The affidavit in support of the search warrant provided probable cause to believe that the “antique guns” were probably in the Canestri residence	6
POINT II—The descriptions of the antique guns provided by the informants was specific enough for the magistrate to make a finding of probable cause to believe that the same firearms taken in the Mezzonotte burglary were in the Canestri residence ..	10
POINT III—The search of the basement storeroom was within the scope of the search warrant	12
POINT IV—The firearms were properly seized, even though they were not described in the search warrant	15
CONCLUSION	18

TABLE OF CASES

<i>Aguilar v. State of Texas</i> , 378 U.S. 108 (1964)	6, 7
<i>Anglin v. Director, Patulent Institution</i> , 439 F.2d 1342 (4th Cir. 1971), <i>cert. den.</i> , 404 U.S. 946 (1971) ..	17
<i>Aron v. United States</i> , 382 F.2d 965 (8th Cir. 1967) ..	17

	PAGE
<i>Bastida v. Henderson</i> , 485 F.2d 880 (5th Cir. 1973) ..	12
<i>Conti v. Morgenthau</i> , 232 F. Supp. 1004 (S.D.N.Y. 1964)	12
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	16
<i>Gurleski v. United States</i> , 405 F.2d 253 (5th Cir. 1968), <i>cert. den.</i> 395 U.S. 981 (1969)	17
<i>Guzewicz v. Slayton</i> , 366 F. Supp. 1402 (E.D. Va. 1973)	12
<i>Marone v. United States</i> , 275 U.S. 192 (1927)	16
<i>McCreary v. Sigler</i> , 406 F.2d 1264 (8th Cir. 1969)	8
<i>Porter v. United States</i> , 335 F.2d 602 (9th Cir. 1964), <i>cert. den.</i> , 379 U.S. 983 (1965)	17
<i>Rugendorf v. United States</i> , 376 U.S. 528 (1964)	9
<i>Spinelli v. United States</i> , 393 U.S. 410 (1969)	6, 7
<i>Traverse v. United States</i> , 362 F.2d 477 (9th Cir. 1966), <i>cert. den.</i> 385 U.S. 885 (1966)	7
<i>United States v. Burno</i> , 340 F. Supp. 1326 (D.D.C. 1972)	17
<i>United States v. Bell</i> , 457 F.2d 1231 (5th Cir. 1972) ..	8
<i>United States v. Berry</i> , 423 F.2d 142 (10th Cir. 1970)	17
<i>United States v. Bozza</i> , 365 F.2d 206 (2d Cir. 1966) ..	7
<i>United States v. Burke</i> , — F.2d — (2d Cir. 1975), slip op. at 3571 (May 15, 1975)	8
<i>United States v. Canieso</i> , 470 F.2d 1224 (2d Cir. 1972)	9
<i>United States v. Cotham</i> , 363 F. Supp. 851 (W.D. Tex. 1973)	9, 10
<i>United States v. Dzialak</i> , 441 F.2d 212 (2d Cir. 1971)	17

	PAGE
<i>United States v. Epstein</i> , 240 F. Supp. 84 (S.D.N.Y. 1965)	12
<i>United States v. Freeman</i> , 358 F.2d 459 (2d Cir. 1966), cert. den. 385 U.S. 882 (1966)	12
<i>United States v. Harris</i> , 403 U.S. 573 (1971)	6, 7, 8, 9
<i>United States v. Jordan</i> , 349 F.2d 107 (6th Cir. 1965)	14
<i>United States v. Koonce</i> , 485 F.2d 374 (8th Cir. 1973)	12
<i>United States v. Majchszak</i> , 357 F. Supp. 1371 (E.D. Wisc. 1973)	10
<i>United States v. Marihart</i> , 472 F.2d 809 (8th Cir. 1972) en banc.	8
<i>United States v. Pacelli</i> , 470 F.2d 67 (2d Cir. 1972), cert. den. 410 U.S. 983 (1973)	16, 17
<i>United States v. Roman</i> , 451 F.2d 579 (4th Cir. 1971), cert. den. 405 U.S. 963 (1972)	8
<i>United States v. Santore</i> , 290 F.2d 51 (2d Cir. 1960), cert. den. 365 U.S. 834 (1971)	13
<i>United States v. Seymour</i> , 369 F.2d 825 (10th Cir. 1966), cert. den. 386 U.S. 987 (1967)	17
<i>United States v. Shipstead</i> , 433 F.2d 368 (9th Cir. 1970)	7
<i>United States v. Sultan</i> , 463 F.2d 1066 (2d Cir. 1972)	7, 9
<i>United States v. Unger</i> , 469 F.2d 1283 (7th Cir. 1972), cert. den., 411 U.S. 920 (1973)	8
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965)	9, 11
<i>United States v. Viggiano</i> , 433 F.2d 716 (2d Cir. 1970)	9
<i>United States v. Zeidman</i> , 444 F.2d 1051 (7th Cir. 1971)	15, 17
<i>Walker v. United States</i> , 327 F.2d 597 (D.C. Cir. 1963), cert. den., 377 U.S. 956 (1964)	14

Statutes Involved

Title 26 U.S.C.

§ 5845. Definitions

For the purpose of this chapter—

(a) **Firearm.**—The term “firearm” means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term “firearm” shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon.

(b) **Machinegun.**—The term “machinegun” means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.—The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(h) Unserviceable firearm.—The term “unserviceable firearm” means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) Make.—The term “make”, and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

§ 5861. Prohibited acts

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

§ 587. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1234.



United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1143

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES V. CANESTRI,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On November 21, 1972, a Federal Grand Jury, sitting in New Haven, Connecticut, returned a three count indictment (Criminal No. 13,210) charging James V. Canestri with violations of Title 26, United States Code, Sections 5861(d) and 5871 in connection with the possession of three unregistered firearms on October 19, 1972.

Prior to this, on November 1, 1972, U.S. Magistrate Arthur H. Latimer had issued a warrant for the arrest of James V. Canestri on a complaint charging him with possession of unregistered firearms on October 19, 1972.

On December 26, 1972, Canestri entered a plea of not guilty to all counts of the indictment.

Canestri filed a Motion to Suppress on February 8, 1973. A hearing on this Motion to Suppress was held on

February 6, 1974, and on May 23, 1974, Canestri's Motion was denied by Judge Zampano.¹

The jury trial of Canestri commenced on October 23, 1974, Judge Robert C. Zampano presiding, at which evidence was taken on an additional Motion for Suppression of Evidence.² The evidentiary portion of the trial was concluded on October 23, 1974. On October 24, 1974, summations by counsel were heard, and the jury was charged by the Court. A verdict of guilty on all counts of the indictment was returned against Canestri.

On March 10, 1975, Canestri was sentenced to imprisonment for a term of 18 months. Thereafter, Canestri filed a timely notice of appeal.

Statement of Facts

On October 19, 1972, at approximately 8 p.m., a State of Connecticut search warrant was executed at 85 Grannis Road, Orange, Connecticut, by officers of the Orange Police Department and a member of the New Haven Regional Crime Squad (71a, 72a).^{*} The warrant commanded the officers to search a ranch type house with two car garage, known as 85 Grannis Road, Orange, Connecticut, and to seize certain described "antique firearms" which had been stolen during a burglary of an Orange, Connecticut, residence on October 16, 1972 (9a, 7a).

Mrs. Josephine Canestri (The defendant's mother) admitted the officers to the residence and they commenced their search (24a —). The officers began searching the

¹ The Court's opinion is found in 376 F. Supp. 1149.

² This motion concerned admissions of the defendant with respect to possession of the firearms.

^{*} References to the Appendix are designated "—a".

upstairs portion of the house and in the bedroom of Joseph Canestri [the defendant's brother] they seized some narcotic paraphernalia (26a, 73a).

While some of the members of the "search team" were continuing to search the upstairs portion of the premises, Officer Carl Fumiatti of the Regional Crime Squad proceeded to the basement of the residence and began to search this area. There, he observed a large recreation type room which had a locked area at one end of the basement (71a, 75a, 76a, 77a). Mrs. Canestri described this room as the "kid's" room. The officers were unable to enter this room because it was locked and Mrs. Canestri did not have a key to the lock (47a, 77a).

Shortly after Officer Fumiatti went to the basement of the Canestri residence, a family friend, Carl D'Biango, arrived at the basement and he contacted the defendant by phone and advised him what was transpiring at the house (78a, 79a). Canestri indicated (via telephone) he would come to the house and gave instructions to D'Biango concerning how entry could be gained to the locked room in his absence (79a, 80a). The door to the locked room was then "jimmied" (80a, 32a, 33a). At approximately 9 p.m. on the evening of October 19, 1972, entry was gained to the locked room and upon opening the door to this room Officer Rubino was confronted by an "arsenal" of weapons (81a, 50a —). In addition to the room being filled with guns, Rubino observed tools, tool boxes, and "equipment for loading shells" (50a —). Officer Rubino entered the room and began to compare the first five firearms he found with the firearms sought in the search warrant. Officer Rubino took the serial numbers of those five firearms and telephonically [a phone was located in the storeroom] contacted the National Crime Information Computer Center [N.C.I.C.] at Hartford, Connecticut, to determine if any of the five weapons were stolen (25a, 51a, 35a). Of the first five weapons examined by Rubino and whose serial

numbers were run through the N.C.I.C., one was reported to be stolen (51a and 26a —). James Canestri arrived at the basement just after Rubino learned that one of the first five guns he had examined was a stolen weapon (51a —). James Canestri produced a key and opened the cabinets. Inside these cabinets Officer Rubino found two AR-15's, a German machine gun, and a short-barrel rifle (52a —). Officer Rubino seized these four weapons at this time. He believed the short-barrel rifle to be contraband because of its size and he believed the two AR-15's and the German machine gun to be contraband because they were automatic weapons³ (53a, 54a, 39a).

Subsequent to the discovery of the suspected machine guns and short barrel rifle, some suspected narcotics and narcotics paraphernalia was found in a small metal box located in this basement room (90a, 94a, 95a). After the discovery of the additional suspected narcotics a discussion ensued between James Canestri and Officer Fumiatti to the effect that if the "antique guns" sought under the warrant could be returned no charges would be brought against Joseph Canestri for possession of stolen property, nor against James Canestri for possession of narcotics (89a-91a). Joseph Canestri then arrived at the premises and had a discussion with James Canestri (92a —). Joseph Canestri and an unidentified individual then left the premises and returned some two to three hours later and turned over "all but one" of the antique firearms sought under the warrant (93a —).

³ Subsequent examination by personnel of the Bureau of Alcohol, Tobacco and Firearms determined that with respect to the weapons seized by Officer Rubino, one of the AR-15's was a fully-automatic rifle (Tr. 116)*; the "German machine gun" was a German MP-40 sub-machine gun capable of being readily restored to fire (Tr. 118 and 164). See 26 U.S.C. 5845(b) and the "short barrel rifle" was a Marlin Model 75, 22 caliber semi-automatic rifle with a barrel length of 7½" (Tr. 119). See 26 U.S.C. 5845(a)(3).

* References to the trial transcript are designated "Tr."

The "search team" left the premises at approximately 12:45 a.m. on October 20, 1972 [immediately after Joseph Canestri returned with the "antique guns" sought under the warrant] (92a, 93a, 33a). When Officer Rubino left the Canestri residence he took with him the two AR-15's, the short-barrel rifle, and the German sub-machine gun. In addition to that he took five additional firearms and one knife which he had determined were stolen through telephone checks with the N.C.I.C.⁴ (10a, 41a, 63a-67a).

It was stipulated that at the time Officer Rubino seized the two AR-15's, the German machine gun, and the short barrel rifle, he would have been unable to contact the National Firearms Registration and Transfer Record section to determine whether or not these firearms were registered to James Canestri (MS Tr. 94-95).*

Questions Presented

- I. Was the affidavit sufficient for the state judge to conclude there was probable cause and believe that the Mezzonotte gun collection was in the Canestri residence?
- II. Was the search of the basement room beyond the scope of the search warrant?
- III. Was the seizure of the three firearms, not listed in the State search warrant for stolen "antique guns", proper?

⁴ Three M-16 selector switches were also seized (10a).

* References to the transcript of the motion to suppress are designated "MS Tr."

ARGUMENT

I.

The affidavit in support of the search warrant provided probable cause to believe that the "antique guns" were probably in the Canestri residence.

The State of Connecticut search warrant was issued on the basis of the affidavits of two Orange, Connecticut, police officers. The initial informant listed in the affidavit is identified as "an informant whom the affiant, Roger Addil, has known for the past two years". This informant was not identified in the affidavit as being a "reliable", "credible", or "prudent" person.

The question of the reliability of the informant and whether the affidavit contains sufficient information upon which a magistrate may base a finding of probable cause has been discussed in the *Aguilar-Spinelli-Harris* trilogy. *Aguilar v. State of Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Harris*, 403 U.S. 573 (1971).

A "two-pronged" test was used in *Aguilar*:

[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where they were, . . . [and]

[S]ome of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was credible or his information was "reliable". [378 U.S. at 114].

The two prongs were that a basis for an informant's conclusion must be stated and a showing of the informant's reliability must be made.

In *Spinelli*, the warrant's affidavit was found insufficient. But, the Court found a warrant might pass if supporting information in the affidavit buttresses an otherwise unacceptable informant's tip. *Id.* at 415.

In *Harris*, the Court considered what showing is necessary to satisfy a magistrate that there is a substantial basis for crediting an unidentified informant who purports to relate personal knowledge of a crime. 403 U.S. at 575. The warrant in *Harris* was upheld and the Court took into account several factors; i.e., that the informant's accusation was against his penal interest, the affidavit related personal observations by the informant, and the officer's knowledge of the suspect's reputation. *Id.* at 579-583.

The affidavit in this case recites the initial informant's personal observation of several "antique" handguns in the possession of Joseph Canestri at 85 Grannis Road, Orange, Connecticut. As in *Harris*, the personal observations of the informant met the first prong of *Aguilar*.

There is no statement by the affiant that the informant had previously given "correct" information. In *Harris*, the Court states that the issue is whether the informant's "present" information is truthful or reliable. *Id.* at 581-582. The reliability of an informant may be established in collateral ways. *United States v. Sultan*, 463 F.2d 1066, 1068-1069 (2d Cir. 1972); *United States v. Bozza*, 365 F.2d 206, 225 (2d Cir. 1966). This affidavit recites a previous police investigation in which Joseph Canestri was found in possession of stolen merchandise. The affidavit relates that it is common knowledge among the members of the Orange Police Department that Joseph Canestri and Kenneth Davis were friends. It further states that Kenneth Davis had access to the Mezzonotte residence previous to the burglary.³

³ Information establishing probable cause may be relayed from one police officer to another. See *United States v. Shipstead*, 433 F.2d 368, 372 (9th Cir. 1970); *Traverse v. United States*, 362 F.2d 477, 481 (9th Cir. 1966), *cert. den.*, 385 U.S. 885 (1966).

In *Harris* the magistrate was allowed to rely on the police officer's knowledge of the suspect's reputation. *Id.* at 583.

In this case, the content of the affidavit intrinsically proves the truthfulness and the reliability of the informant. The property taken from the Mezzonotte residence was an antique gun collection. It is not the ordinary "booty" of a burglary, e.g. money, radios, televisions and other electric appliances. This unidentified informant could not have given the detailed description of the guns to Officer Addil unless he had actually seen the antique guns. In this case there is further corroboration of the informant's trustworthiness in that there is official verification that a crime, the Mezzonotte burglary, had occurred. *United States v. Marihart*, 472 F.2d 809, 815 (8th Cir. 1972) (*en banc.*); *United States v. Roman*, 451 F.2d 579 (4th Cir. 1971), *cert. den.*, 405 U.S. 963 (1972); *McCreary v. Sigler*, 406 F.2d 1264, 1269-70 (8th Cir. 1969). The specificity of the informant's information as to when, where and what he saw may also be used to corroborate his reliability. *United States v. Unger*, 469 F.2d 1283, 1287 (7th Cir. 1972), *cert. den.*, 411 U.S. 920 (1973); *United States v. Marihart, supra*, at 812-815.

There is nothing to show that this unidentified informant was a professional informant. The informant was an eye witness to a crime (possession of stolen property) and was not passing along idle rumor or some other comment that may have been overheard in a bar. It was not necessary for Officer Adill to state that the informant was "reliable". *United States v. Burke*, — F.2d — (2d Cir. 1975), slip op. at 3574-3577 (May 15, 1975); *United States v. Bell*, 457 F.2d 1231, 1238-1239 (5th Cir. 1972).⁶

⁶ Officer Addil had been involved in law enforcement for a period of 3 months at the time this search warrant was sought. He states that he had known the informant for some two years prior to October 19, 1972 (7a). Therefore it is probable that this informant was an acquaintance of the officer and should not be considered in the realm of professional informers.

The subject matter of this search was stolen property and not narcotics. It is suggested that the subject matter to be searched for is a factor which the magistrate may consider since informants are "much less likely to lie" in this type of crime than in narcotics cases. *United States v. Sultan, supra*, at 1069.

There was a substantial basis for the state judge's finding probable cause based upon the information supplied by this unidentified informant. The police officer had known the informant for two years. The antique gun collection was personally observed in the possession of Joseph Canestri, in the Canestri home by the informant. The informant recited a detailed description of the guns which enabled the officer to say they "fit the description of the guns taken from the Mezzonotte home" two days before. The state judge was also advised that Joseph Canestri was known to have been in possession of stolen merchandise previously. There was additional corroboration provided by a reliable, and tested informer who advised the police that on the day of the burglary Davis, a friend and associate of Canestri, had the weapons in his possession.

Therefore, the District Court was correct in concluding that if the original tip from the initial informant was insufficient, it was bolstered by trustworthy information obtained by independent police investigation. There was official verification of the crime, the tip from a known informant, corroboration by a reliable informer, and police knowledge of the suspect's reputation. These were all factors which the District Court properly concluded the State judge was able to use and assess in order to find probable cause for the issuance of the search warrant. See *United States v. Harris, supra*, 580-583; *United States v. Ventresca*, 380 U.S. 102, 109 (1965); *Rugendorf v. United States*, 376 U.S. 528, 531-533 (1964); *United States v. Canieso*, 470 F.2d 1224, 1231 (2d Cir. 1972); *United States v. Viggiano*, 433 F.2d 716, 718-719 (2d Cir. 1970); *United*

States v. Cotham, 363 F. Supp. 851, 856 (W.D. Tex. 1973); *United States v. Majchszak*, 357 F. Supp. 1371, 1373-1374 (E.D. Wisc. 1973).

There was a substantial basis for crediting the information of the initial informant and the state judge had probable cause to believe the Mezzonotte gun collection was probably in the Canestri residence.

II.

The descriptions of the antique guns provided by the informants was specific enough for the magistrate to make a finding of probable cause to believe that the same firearms taken in the Mezzonotte burglary were in the Canestri residence.

The property sought in the search warrant was by its own description unusual. Both of the informants recited their personal observations of two different individuals in possession of antique handguns and these descriptions bear amazing similarity to the detailed descriptions of the antique gun collection stolen from the Mezzonotte residence. The initial informant stated that while on the Canestri premises he was shown several antique handguns and he gave affiant Adill a description of some of the guns he had observed. He was able to specifically describe four of the antique guns he saw and he stated that Joseph Canestri had told him he had purchased several antique handguns. The other informant advised he had seen three firearms and he described two of them with some particularity. When the firearms that were described by the informants are compared with the list of firearms taken in the Mezzonotte burglary, each one of those firearms described by the informants matches a firearm stolen in the Mezzonotte burglary.

The time sequence of events that occurred with reference to the informants is important in determining probable

cause here. The Mezzonotte burglary occurred on October 16, 1972, between 10 a.m. and 11:30 a.m. The second informant states he personally observed Kenneth Davis at 11 a.m. on October 16, 1972, in possession of three handguns and when the description of the two guns he described is compared to the list of items stolen they are very similar. On the evening of October 17, 1972, the other informant was shown "several antique handguns by Joseph Canestri". This took place at the Canestri residence at 85 Grannis Road, and once again when the antique handguns described by the informant are compared to those stolen in the Mezzonotte burglary, each one of the handguns described by the informant matches a gun taken in the burglary. In addition, Joseph Canestri stated that he had purchased several antique handguns.

In *United States v. Ventresca, supra*, at 108, the Court stated that search warrants must be interpreted in a common sense and realistic fashion and that police officers must not be held to precise "legal" language in seeking search warrants. The defendant's attempt to differentiate the handguns observed by the informants from the firearms taken in the Mezzonotte burglary is without merit. The common thread that runs through the description of the Mezzonotte gun collection is that they were handguns. The common thread running through the information of the informants is that they saw handguns. The Webster's Seventh New Collegiate Dictionary defines the following terms:

firearm: A weapon from which a shot is discharged by gunpowder; *handgun*: a firearm held and fired with one hand; *pistol*: a short firearm intended to be aimed and fired with one hand, and a handgun whose chamber is integral with the barrel; *revolver*: a handgun with a cylinder of several chambers brought successively into line with the barrel and discharged with the same hammer.

All of the foregoing definitions overlap with each other and relate to each other. It is therefore nonsensical to attempt to distinguish the firearms taken in the Mezzonotte burglary from the firearms the informants saw on the basis that the informants described handguns and revolvers interchangeably.

In the present case, both the state court judge, and the United States District Court, reviewed the instant affidavit and found that it provided probable cause for the issuance of the search warrant. These independent determinations of probable cause are entitled to be afforded great weight by a reviewing court. See, e.g., *United States v. Freeman*, 358 F.2d 459, 462 (2d Cir. 1966), *cert. den.*, 385 U.S. 882 (1966); *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *Bastida v. Henderson*, 485 F.2d 880, 863 (5th Cir. 1973); *United States v. Epstein*, 240 F. Supp. 84, 85 (S.D.N.Y. 1965); *Conti v. Morgenthau*, 232 F. Supp. 1004, 1006 (S.D.N.Y. 1964); *Guzewicz v. Slayton*, 366 F. Supp. 1402, 1406 (E.D. Va. 1973).

For all the foregoing reasons, there was probable cause to believe the same firearms taken in the Mezzonotte burglary were in the Canestri residence.

III.

The search of the basement storeroom was within the scope of the search warrant.

The District Court found "The permissible scope of the search extended to every room in the house, including the locked storeroom in the basement".

The state search warrant authorized a search of the entire premises known as 85 Grannis Road, Orange, Connecticut. The search warrant accurately described the premises and the Town Clerk's office in the Town of Orange,

listed Mrs. Josephine Canestri as the owner of the property. In addition to that, the police records noted that Joseph Canestri resided there.

The subject of this search warrant was an "antique gun" collection of some eighteen handguns.

The informant did not describe the location in the residence where he was shown the "antique handguns" by Joseph Canestri. The search warrant was not limited to Joseph Canestri's bedroom nor to any other room in the house.

There is no indication that the officers conducted any rummaging around the premises. After a search of the upstairs they concentrated their efforts on a search of the storeroom in the basement. The representation that all of the contents of the storeroom in the basement, including a key necessary for access to this room, belonged to James Canestri does not preclude a search of the room. There is no evidence that Joseph Canestri, who lived at 85 Grannis Road, did not have equal access to this room. The search team did not have any notice of the status of that room until after the search was well underway when "it was too late for them, consistent with the success of their mission, to have retreated and obtained a new warrant." *United States v. Santore*, 290 F.2d 51, 67 (2d Cir. 1960), *cert. den.*, 365 U.S. 834 (1971).

The locked storeroom found in the basement was an integral part of 85 Grannis Road. The basement was described as being a recreation type room and the locked storeroom was at one end of the basement. The room was a storeroom in the basement. It was not a separate apartment or the separate living quarters of James Canestri.

The storeroom was also a likely place for the antique guns to be hidden. It was therefore incumbent upon the police to search that room to determine if it contained the

property sought in the warrant. The search of the store-room was reasonable, and to suggest that the search could be frustrated by the mere declaration of the owner of the residence that one of the rooms therein belongs to another party not named in the warrant is without merit. See *United States v. Jordan*, 349 F.2d 107, 109 (6th Cir. 1965); *Walker v. United States*, 327 F.2d 597, 599-600 (D.C. Cir. 1963), *cert. den.*, 377 U.S. 956 (1964).

Although the length of the search in this matter lasted approximately four and a half hours, the firearms which are the subject of the indictment were discovered during the early part of the search. These firearms were discovered immediately after James Canestri arrived at the premises and opened the locked cabinets. This was at approximately 9:30 p.m., some one and a half hours into the search. At the time these firearms were discovered there was no assurance that the "antique gun collection" sought under the warrant was not located on the premises (80a-82a, 85a, 51a-53a).

The search warrant sought some eighteen stolen handguns and there is no reason to believe that one or more of them were not secreted somewhere on the premises and this belief continued to be a reasonable one on the part of the "search team" until Joseph Canestri appeared with the stolen gun collection and turned them (the guns stolen from the Mezzonotte's) over to the police officers.

IV.

The firearms were properly seized, even though they were not described in the search warrant.

The AR-15 automatic rifle, the German MP-40 sub-machine gun, and the Marlin Model 75, 22 caliber short barrel rifle, found in the basement room were properly seized since they were contraband in plain view that were inadvertently found during the course of a lawful search, and the seizing officer had probable cause to believe that this contraband was the instrumentality of another independent crime being committed in his presence.

Canestri claims that the seizure of these firearms was improper because Officer Rubino had no probable cause to believe that the firearms were contraband at the time of their seizure, in that the officer did not know that the guns were not registered [26 U.S.C. § 5861(d)] and that Officer Rubino had not determined that the firearms were serviceable. These contentions are without merit. Officer Rubino was not an expert on firearms. However, upon finding these weapons on the premises he had probable cause to believe that these weapons were in fact prohibited. He knew they appeared to be machine guns and he testified he knew the sawed-off rifle was a prohibited weapon (39a). He seized the weapons at this juncture and the next day notified the Bureau of Alcohol, Tobacco and Firearms for further investigation. It was stipulated that the only way to determine whether or not the firearms were in fact registered in the National Firearms Register and Transfer Record was for an agent of the Bureau of Alcohol, Tobacco and Firearms to make the inquiry with the registration section of that bureau. (MS Tr. 94-95) Therefore, while the officers were at the premises they could not make a determination as to whether or not the firearms were registered. See *United States v. Zeidman*, 444 F.2d 1051 (7th Cir. 1971).

The claim that the firearms could not be seized without determining whether or not the guns were serviceable, has no merit. It is submitted that the only way to determine whether or not a weapon is serviceable is to fire it (Tr. 116). It is inconceivable to believe that the officers would attempt to fire those weapons at the premises before seizing them.

The law is clear that in certain circumstances police officers may seize evidence without a warrant. As the Supreme Court has stated in *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971), with respect to the "plain view" exception:

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object . . . or some other legitimate reason for being present . . .

Of course the *Coolidge* rationale does not permit a general exploratory search for any incriminating evidence, cf. *Marone v. United States*, 275 U.S. 192 (1927). As this court has recognized, the determinative factor is that the police officers came across the incriminating evidence inadvertently. *United States v. Pacelli*, 470 F.2d 67, 70-71 (2d Cir. 1972), *cert. den.*, 410 U.S. 983 (1973). Here the search team was lawfully in the basement room, pursuant to a valid search warrant. While searching the cabinet for stolen "antique guns" specified in the search warrant, they discovered the automatic weapons and the short barrel rifle. While Officer Rubino had some doubts as to the nature of these weapons, he believed them to be contraband and took possession of them and contacted the Bureau of Alcohol, Tobacco and Firearms to conduct a further investigation.

Officer Rubino would have been derelict in his duty if he had not taken these weapons into his custody when he

had belief that the firearms were contraband. *United States v. Berry*, 423 F.2d 142, 144 (10th Cir. 1970). See also *United States v. Zeidman*, *supra*; *Anglin v. Director, Patuxent Institution*, 439 F.2d 1342, 1347 (4th Cir. 1971), *cert. den.*, 404 U.S. 946 (1971); *Gurleski v. United States*, 405 F.2d 253, 258 (5th Cir. 1968), *cert. den.*, 395 U.S. 981 (1969); *Aron v. United States*, 382 F.2d 965, 973 (8th Cir. 1967); *United States v. Seymour*, 369 F.2d 825, 827 (10th Cir. 1966), *cert. den.*, 386 U.S. 987 (1967); *Porter v. United States*, 335 F.2d 602, 607 (9th Cir. 1964), *cert. den.*, 379 U.S. 983 (1965); *United States v. Barno*, 340 F. Supp. 1326 (D.D.C. 1972).

The search in this case, unlike the search in *United States v. Dzialak*, 441 F.2d 212 (2d Cir. 1971), was a carefully conducted search of limited duration wherein the police left the premises as soon as the search was concluded. There was neither an "abhorrent general search" nor a "ransacking" of the house. As in *United States v. Pacelli*, *supra*, at 71, the police had no prior knowledge that they would find an arsenal in the basement. The officers fortuitously came upon a hidden arsenal of weapons while executing a search warrant for stolen antique guns in good faith. Telephone checks revealed that some of the weapons were stolen and it was then incumbent upon the police to continue searching the room for further incriminating articles. It was at this point in time that the firearms named in the indictment were found and seized and the search for the guns described in the warrant continued (52a-53a).

It is clear that the "search team" in this case was properly and lawfully present in the basement room; they observed the weapons in question in plain view as they were taken from the cabinet, the officers were searching for stolen property; there was an immediate suspicion that the weapons were contraband and the weapons were seized. The officer had no alternative but to take the weapons into his possession in order to faithfully execute the duty and function of law enforcement officers.

CONCLUSION

For the reasons stated it is urged that the decision of the District Court denying the defendant's Motion to Suppress be sustained and that the judgment of conviction appealed from be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut
915 Lafayette Blvd.
Bridgeport, Connecticut 06603

THOMAS F. MAXWELL, JR.
Assistant United States Attorney

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1143

UNITED STATES OF AMERICA

Appellee

v.

JAMES V. CANESTRI

Appellant

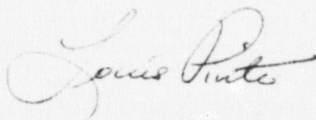
AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street
Brooklyn, N.Y.

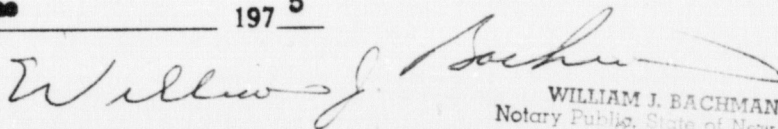
That on the 9th day of June, 1975, deponent served the within Brief for the Appellee
upon Ira Grudberg, Esq.
207 Orange Street
New Haven, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,



This 9th day of June 197 5



WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976